

ORIGINAL

Before The
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In re:)
)
)
Broadcast Television National) MM Docket No. 96-222
Ownership Rules)
)
Review of Commission's Regulations) MM Docket No. 91-221
Governing Television Broadcasting)
)
Television Satellite Stations) MM Docket No. 87-8
Review of Policy and Rules)

To: The Commission

REPLY COMMENTS OF BET HOLDINGS INC.

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March 20, 1997

No. of Copies rec'd 0210
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Executive Summary

The Federal Communications Commission ("FCC" or "Commission") must evaluate the cumulative impact of recent changes to broadcast television rules before it adopts the proposed rules in this and related broadcast ownership proceedings.^{1/} The FCC's decisions in these proceedings will ultimately determine whether new entrants will have an opportunity to participate in broadcasting as it moves to the digital age, or whether regulatory and competitive entry barriers will be so high that incumbent broadcasters will dominate the broadcast marketplace. The Commission's statutory diversity obligations pursuant to Section 307(b), the impact of recent changes to broadcast licensing rules and digital television rules pursuant to the 1996 Telecommunications Act, and the Commission's broadcast public interest obligations, must be assessed in the aggregate when considering further changes to broadcast ownership and attribution rules.

The Commission must uphold its statutory mandate to eliminate market entry barriers and ensure that small businesses are not foreclosed from participating in the ongoing communications revolution.^{2/} In this context, the Commission must consider the effects of

^{1/} To assess the impact on consolidation and diversity of ownership in TV broadcasting, the FCC must analyze the overall impact of its pending actions in the Digital Television licensing proceeding as well as the following ownership/attribution proceedings. 1) Broadcast Television National Ownership Rules (MM Docket No. 96-222); Review of the Commission's Regulations Governing Broadcast Television (MM Docket No. 91-221); Television Satellite Stations Review of Policy and Rules (MM Docket No. 87-8), Notice of Proposed Rulemaking, FCC 96-437; released November 7, 1996 (hereinafter, "National Ownership Proceeding"); 2) Review of the Commission's Regulations Governing Broadcast Television, MM Docket No. 91-221 and Television Satellite Stations Review of Policy and Rules, MM Docket No. 87-7, Second Further Notice of Proposed Rulemaking, FCC 96-438, released November 7, 1996 ("Local Ownership Proceeding"), and Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests, MM Docket No. 94-150, Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry, MM Docket No. 92-51, and Reexamination of the Commission's Cross-Interest Policy, Further Notice of Proposed Rulemaking, MM Docket No. 87-154, FCC 92-436, released November 7, 1996 (hereinafter, "Attribution Proceeding").

^{2/} In the Matter of Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses, GN Docket No. 96-113 Notice of Inquiry, 11 FCC Red 6280 (1996).

ownership concentration and predictability of access to capital for new entrants into broadcasting.^{3/} The Commission also has a statutory mandate to ensure that the public interest, convenience, or necessity will be served by grant of broadcast licenses.^{4/}

Section 307(b) of the Act^{5/} mandates that the Commission distribute licenses in a fair, efficient and equitable manner. Further, a "fundamental purpose" of the Commission's regulation of broadcasting for nearly 50 years has been "to promote diversification of ownership in order to maximize diversification of program and service viewpoints."^{6/} Diversification of control of the broadcast media is particularly desirable where, as here, a government licensing system limits access by the public to the use of television facilities.^{7/}

BET urges the Commission to use the television broadcast market as the relevant market for examining competitive entry barriers. The market definition of multichannel video programming delivery, which is based on the definition of a cable system and uses cable franchise areas as the relevant geographic market, is not the correct market definition to examine proposed changes in the over-the-air, broadcast television market.^{8/} Unless the Commission uses

^{3/} See, *Id.* at 6287, citing Competitive Bidding Fifth Report and Order, 9 FCC Rcd 5532, 5535 (1994).

^{4/} 47 U.S.C. § 307(a); 47 U.S.C. 309(a).

^{5/} "[T]he Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several states and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." Section 307(b) of the Communications Act of 1934, as amended (hereinafter, "Act"), 47 U.S.C. § 307(b).

^{6/} Amendment of Sections 3.35, 3.240, and 3.636 of Rules and Regulations Relating to Multiple Ownership of AM, FM and Television Broadcast Stations (Report and Order), 18 FCC 288, 291 (1953).

^{7/} Policy Statement of Comparative Broadcast Hearings, 1 FCC 2d 393, 394 (1965).

^{8/} This multi-channel video programming market analysis derives from the cable regulation set forth in the Cable Television Consumer Protection and Competition Act of 1992, Public L. No. 102-385, 106 Stat. 1460 (1992).

the broadcast market to examine the effect of any proposed changes, Section 307(b) diversity obligations will be effectively "written out" of the Communications Act.

Consolidation of TV broadcast ownership will increase significantly because of several factors: 1) changes to FCC broadcast licensing procedures, 2) changes to FCC national ownership rules, 3) deregulation of the financial interest and syndication restrictions, and 4) the Digital Television ("DTV") licensing plan. An unprecedented number of mergers and acquisitions have occurred since elimination of the financial interest and syndication rules and passage of the Telecommunications Act of 1996 (the "Telecom Act").^{9/} Over \$10 billion in television transactions occurred in 1996, more than doubling the \$4.6 billion that occurred in 1995.^{10/} Without careful consideration of these factors, further actions by the FCC to relax TV ownership and attribution rules will increase broadcast ownership concentration among a small group of incumbent broadcasters and create insurmountable barriers to new entrants in digital, as well as analog, TV broadcasting.

Recent changes to the broadcast licensing rules also will hasten the further concentration of broadcast ownership and curtail the opportunity for new entrants to acquire TV licenses. The Commission has lengthened the broadcast license terms of television stations from 5 years to 8 years,^{11/} implemented a new two-step broadcast renewal process that eliminates comparative renewal hearings and essentially renews broadcast licenses automatically,^{12/} and "frozen"

^{9/} Pub. L. 104-104, 110 Stat. 56 (1996).

^{10/} "Consolidation Yea or Nay," Broadcasting and Cable, p. 4, January 27, 1997.

^{11/} Implementation of Section 203 of the Telecommunications Act of 1996 (Broadcast License Terms) Sections 73.1020 and 74.15, 12 FCC Rcd ____, MM Docket No. 96-60, FCC 97-17, released January 24, 1997.

^{12/} Renewal expectancies are granted provided the licensee has met certain public interest requirements. Implementation of Sections 204(a) and 204(c) of the Telecommunications Act of 1996 (Broad-

applications for new television station allotments.^{13/} As a result of these changes, new entrants are shut out of the broadcast TV markets, while incumbent broadcasters can continue to combine with other incumbents to increase their market presence, up to 35% of the national audience.^{14/}

The DTV licensing process also will magnify incumbent broadcasters' market power. The FCC has proposed that each incumbent "full-service" broadcaster will be given an additional 6 MHz channel to implement DTV.^{15/} The Commission has also adopted DTV technical standards that will allow existing broadcasters to provide multiple streams of standard definition programming.^{16/} Further, spectrum flexibility allows DTV channels to be used for other types of wireless communication services.^{17/} Thus, the extra DTV channel the Commission will give

cast License Renewal Procedures) 11 FCC Rcd 6363 (1996).

^{13/} The Commission froze applications for the top 30 broadcast markets in 1987. Advanced Television Systems and Their Impact Upon Existing Television Broadcast Service, MM Dkt. No. 87-268, Order, 2 FCC Rcd 5125 (1987). The Commission froze remaining markets on September 20, 1996, and also provided that any applications filed after October 24, 1991 that had not yet been granted would not receive a 6 MHz DTV channel. Advanced Television Systems and Their Impact Upon Existing Television Broadcast Service, MM Docket 87-268, Sixth Further Notice of Proposed Rulemaking, 11 FCC Rcd 10968, 10973 (1996). The Commission has also frozen processing of all mutually exclusive application cases, creating further barriers to new entrants. See Bechtel v. F.C.C., 10 F.3d 875 (D.C. Cir. 1993), FCC Public Notice, "FCC Freezes Comparative Hearing Proceedings," 9 FCC Rcd 1055 (1994), as modified, 9 FCC Rcd 6689 (1995).

^{14/} Order, FCC 96-91, released March 8, 1996, 61 FR 10691.

^{15/} Memorandum Opinion and Order/Third Report and Order/Third Notice of Proposed Rulemaking, MM Docket 87-268, 7 FCC Rcd 6924, 6926 (1992). The Act requires initial DTV licenses to be allocated to incumbents for free. Broadcasters must pay spectrum fees for providing ancillary services on these DTV channels. 47 U.S.C. § 336(e). The value of the DTV spectrum, if auctioned, has been estimated between \$10 and \$70 billion. "The Great HDTV Swindle," Wired, p. 57, 60, February 1997. The Congressional Budget Office ("CBO") has scored the DTV spectrum at \$12 billion if it were auctioned. Joint Statement of David H. Moore and Perry C. Beider, Congressional Budget Office, before the Subcommittee on Telecommunications and Finance, Committee on Commerce, U.S. House of Representatives, March 21, 1996, at 13.

^{16/} Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, Fourth Report and Order, 11 FCC Rcd ____, MM Docket 87-268, released December 27, 1996, at 4.

^{17/} Id.

away for free to incumbent "full power" broadcasters doubles the amount of spectrum allocated to incumbent TV broadcasters and increases their broadcast market power exponentially.^{18/}

Against the backdrop of recent changes to existing rules, the Commission has proposed changes to local and national ownership rules and attribution rules that will increase concentration among incumbent broadcasters. Specifically, in three related proceedings, the Commission proposed 1) modifications in the calculation of national audience reach,^{19/} 2) use of a Grade A contour instead of a Grade B contour for calculating permitted local ownership structures,^{20/} 3) changes to the attribution rules that will decrease predictability and flexibility,^{21/} and 4) changes to the treatment of TV Satellite stations, LMAs, and JSAs for the purposes of the national and local ownership caps.^{22/}

BET urges the Commission to prevent further concentration of broadcast ownership and avoid creating potential market entry barriers to new entrants as it considers changes to these rules. In considering market entry and public interest factors, the Commission should take special note of minority and women-owned businesses and small businesses. Minority-owned businesses only hold three percent (3%) of all television broadcast licenses.^{23/} Empirical studies

^{18/} "The acquisition by broadcasters of an additional license (apparently at no charge), then, is more than a property rights grab without parallel in the United States since the days of our previous robber barons, the railroads. It is also an extraordinary denial of our professed commitments to increase competition, to lower entry barriers, and to expand opportunities for historically excluded persons in the broadcasting industry." Krattenmaker, Thomas G., "The Telecommunications Act of 1996," Federal Communications Bar Journal, November 1996. The Telecommunications Act of 1996 also "exacerbates a fundamental flaw in our regulatory policy toward broadcasting: the use of spectrum allocation to confer market power on a closed class of privileged broadcasters." Id. at 41.

^{19/} National Ownership Proceeding, supra n. 1 at 1-2.

^{20/} Local Ownership Proceeding, supra n. 1 at 7.

^{21/} Attribution Proceeding, supra n. 1 at 5.

^{22/} National Ownership Proceeding, supra n. 1 at 9-10, Attribution Proceeding, supra n. 1 at 26, 32.

^{23/} Minority Commercial Broadcast Ownership in the United States. The Minority Telecommunica-

have demonstrated a strong correlation between ownership by minority businesses and diversity of programming.^{24/} Congress has also eliminated tax certificates to promote minority and women ownership in television.^{25/} By providing incentives for new entrants to participate in TV broadcasting, the Commission will promote its 307(b) diversity public interest obligation by increasing the pool of potential participants among minorities, women, and small businesses. BET encourages the FCC to adopt incentives for new entrant participation in broadcasting, which would satisfy the Commission's statutory obligation to fairly and equitably distribute licenses, eliminate market entry barriers, and serve the public interest. BET specifically addresses the issues raised in the "national ownership" proceeding below.^{26/}

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tions Development Program, National Telecommunications and Information Administration, United States Department of Commerce, April, 1996.

^{24/} Congressional Research Service, *Minority Broadcast Station Ownership and Broadcast Programming: Is there a nexus?* (June 29, 1986 at 13, 15.).

^{25/} Self-Employed Health Insurance Act of 1995, Pub. L. No. 104-7, §2, 109 Stat. 93 (1995).

^{26/} BET is filing comments simultaneously in the Commission's three related broadcast attribution and ownership proceedings: 1) Broadcast Television National Ownership Rules (MM Docket No. 96-222); Review of the Commission's Regulations Governing Broadcast Television (MM Docket No. 91-221); Television Satellite Stations Review of Policy and Rules (MM Docket No. 87-8), Notice of Proposed Rulemaking, FCC 96-437; released November 7, 1996; 2) Review of the Commission's Regulations Governing Broadcast Television, MM Docket No. 91-221 and Television Satellite Stations Review of Policy and Rules, MM Docket No. 87-7, Second Further Notice of Proposed Rulemaking, FCC 96-438, released November 7, 1996, and Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests, MM Docket No. 94-150, Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry, MM Docket No. 92-51, and Reexamination of the Commission's Cross-Interest Policy, Further Notice of Proposed Rulemaking, MM Docket No. 87-154, FCC 92-436, released November 7, 1996.

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REPLY COMMENTS OF BET HOLDINGS INC.

BET Holdings, Inc. ("BET") hereby submits reply comments in the above-referenced proceeding. BET is a cable television entertainment business that reaches over 45 million cable households through its cable programming services, BET Cable Network, BET on Jazz, and Action Pay-Per-View. BET also produces feature length films through its ventures with BET Film Productions, BET Pictures, and United Image Entertainment. BET has also partnered with Microsoft to develop on-line programming and interactive software products for African-American market consumers.

BET supports Commission rules that will promote diversity of ownership and programming and promote new entrants into the broadcast television and digital television ("DTV") market. As pointed out by Post-Newsweek Stations, Inc., "now that Congress has eliminated the national cap on the number of television stations that one entity may own and has increased the aggregate national audience reach cap to 35 percent, it is more important than ever to ensure that consolidation in the media industry does not lead to the demise of diversity and competition in markets nationwide."¹

I. BET supports inclusion of intermarket satellite stations in the calculation of national audience reach.

BET supports modification of the Commission's rules to include intermarket satellite television stations in calculating national ownership reach. The National Association of Broadcasters ("NAB") also supported the Commission's proposal to adopt a rule that focuses on potential audience reach.² Such an approach fosters diversity by exempting intramarket satellite stations, because they serve the same audience as the primary station. Since BET believes that intermarket satellites (which can provide local programming) extend a broadcaster's reach to a different potential audience, BET opposes NAB's proposal to entertain waivers where the satellite station does not extend coverage to a large portion of a different DMA. The audience from each DMA should be attributed to each station in the market covered by its Grade B contours or signal coverage. Therefore, BET does not believe exemptions for small incursions into another DMA are appropriate.

BET also holds a different view if satellite stations are granted an additional 6 MHz DTV authorization. If satellite stations and full service broadcast stations each receive a 6 MHz DTV

¹ See Comments of Post Newsweek Stations at 9.

² See Comments of National Association of Broadcasters at 2.

channel allocation, the effect is to increase the same broadcaster's voice within the respective markets significantly. Further, as noted in its original comments, the 6 MHz DTV channel allocation can be used for multiple streams of broadcasting. Thus, a station owner who controls a satellite station which receives a DTV allocation would increase its broadcasting market penetration exponentially. Thus, BET supports "double-counting" the station audience for intra- and intermarket satellite stations if satellite stations receive a DTV allocation.

BET opposes CBS' proposal to retain the satellite exemption for all purposes.³ BET also opposes efforts to extend the satellite exemption concept to broader situations where all commonly owned stations within a market would only be counted once for local and national ownership purposes. The original reason for adopting the satellite exemption was that satellite stations could not provide local programming. That distinction has been eviscerated by liberalized FCC rules.

BET agrees with Viacom, Inc. that, especially in cases where DTV channels are allocated to both the primary and satellite station, the DMA's audience should be counted twice for national ownership purposes. Viacom states that the "viewers in a given market are splintered as to their viewing habits and that there is never a point in time at which every person in a DMA is tuned in to the very same television stations. Consequently, when a broadcaster owns or controls two stations in a market, its reach increases as though it had entered a totally separate market and had new capacity to broadcast to an increased population."⁴

BET further agrees that, in those cases where a TV-satellite combination is exempt, or permitted by waiver of the local ownership rules, a broadcaster owning a second satellite station

³ See Comments of CBS, Inc. at 2.

⁴ Viacom Comments at 3.

in the same market should have each station counted against its national ownership reach.⁵ As noted above, if satellite stations also obtain DTV allocations, the amount of spectrum controlled by one party would increase significantly; and the programming capability of a TV-satellite combination would increase dramatically due to the ability to transmit multiple streams of programming on DTV frequencies.

II. BET supports inclusion of LMA stations in national audience reach calculations

In the companion broadcast attribution/local ownership proceedings, BET supported treating television LMAs the same as radio LMAs -- such stations should be attributable for ownership purposes if 15% or more programming was provided by another station. BET continues to believe that television stations operating subject to LMAs should be attributable and counted towards all national audience reach calculations. This approach eliminates the possibility that national ownership restrictions could be evaded by the use of LMAs.

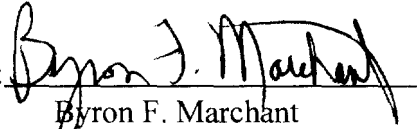
III. BET supports adoption of DMAs as the market definition for determining national audience reach

BET continues to support adoption of a market definition based on Designated Market Areas ("DMA") because formerly used Arbitron markets are no longer updated routinely. No party has suggested an alternative to DMA markets in order to measure national television audience reach..

⁵ Id. at 3-4.

Respectfully submitted,

BET HOLDINGS, INC.

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